Supreme Court, U.S.
FILED
NOV 21 2006
OFFICE OF THE CLERK

No. 06-720

In The

# Supreme Court of the United States

WILLIAM RAINEY,

*Petitioner,*

v.

COMMONWEALTH OF KENTUCKY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky**

## PETITION FOR A WRIT OF CERTIORARI

*Of Counsel:*

KEITH E. KAMENISH
1916 Kentucky Home Life Building
239 South Fifth Street
Louisville, Kentucky 40202
(502) 584-1402

KEVIN C. BURKE
*Counsel of Record*
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether a constitutionally valid search of an automobile incident to arrest requires proof of a former occupant's temporal and spatial proximity to the automobile at the time of arrest?

2. Whether a warrantless search of an automobile is constitutionally valid after the former occupant of the automobile is handcuffed and where the arresting officer testifies that the former occupant never posed a danger of accessing the automobile?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 6 |
| I. THIS COURT SHOULD REQUIRE PROOF OF A FORMER OCCUPANT'S TEMPORAL AND SPATIAL PROXIMITY TO THE AUTOMOBILE AT THE TIME OF ARREST IN ORDER TO JUSTIFY THE SEARCH OF THE AUTOMOBILE AS INCIDENT TO THE ARREST | 6 |
| II. A WARRANTLESS SEARCH OF AN AUTOMOBILE IS NOT JUSTIFIED ONCE THE FORMER OCCUPANT IS RESTRAINED BY HANDCUFFS AND WHERE THE ARRESTING OFFICER TESTIFIES THAT THE FORMER OCCUPANT NEVER POSED A DANGER OF ACCESSING THE AUTOMOBILE | 10 |
| CONCLUSION | 13 |

# TABLE OF AUTHORITIES

Page

CASES

*Chimel v. California*, 395 U.S. 752 (1969).....7, 11, 12

*Coolidge v. New Hampshire*, 403 U.S. 443 (1971)..... 10

*Knowles v. Iowa*, 525 U.S. 113 (1998)..... 10

*Mincey v. Arizona*, 437 U.S. 385 (1978)..... 10

*New York v. Belton*, 453 U.S. 454 (1981).....7, 8, 11, 12

*Slone v. State*, 902 So.2d 852 (Fla. App. 2005)..... 10

*State v. Gant*, 143 P.2d 379 (Ariz. App. 2006)..... 9, 11

*State v. Rathbun*, 101 P.3d 119 (Wash. App. 2004) ..... 10

*Thornton v. United States*, 541 U.S. 615 (2004).....*passim*

*United States v. Laughton*, 437 F.Supp.2d 665 (E.D. Mich. 2006)..... 9

*United States v. Pittman*, 411 F.3d 813 (7th Cir. 2005)..... 9

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment ..... 1

United States Constitution, Fourteenth Amendment..... 1

STATUTE

28 U.S.C. §1257(a) ..... 1

## OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported at 197 S.W.3d 89 and reprinted in the Appendix at 1-16. The Court of Appeals of Kentucky did not publish its opinions which are reprinted in the Appendix at 17-28. The Jefferson Circuit Court Order is reprinted in the Appendix at 28-30.

## JURISDICTION

The Supreme Court of Kentucky decided and filed its opinion on May 18, 2006, and entered an order denying petitioner's motion for rehearing on August 24, 2006. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

The petitioner, William Rainey, was charged with operating a motor vehicle under the influence of intoxicants, reckless driving, possession of a firearm by a convicted felon and being a persistent felony offender in the first degree.

Following Mr. Rainey's motion to suppress, the circuit court suppressed any evidence of the firearm found in Mr. Rainey's automobile because the search did not fall within any exception to the Fourth Amendment warrant requirement. Appendix (hereafter "App.") at 28-30. The circuit court reasoned:

> The defense argues that the search of the vehicle was improper because the search cannot be justified as a search incident to Mr. Rainey's lawful arrest. The Court has been cited the case of *Chimel v. California*, 395 U.S. 752 (1969), as well as other cases which support the position that the search was not lawful. The defendant argues that Mr. Rainey was so far away from his vehicle, which was the Ford Explorer, that he could not have retrieved a handgun or destroyed evidence. Therefore, the Ford was not within his immediate control as required in the case of *Chimel* as well as other cases cited by the defendant. The defense argues that this lack of control by the defendant makes the search unlawful. The Commonwealth does not specifically address this issue in their response. . . . The Court agrees with the arguments advanced by the defendant

> that this search was not lawful and, therefore, suppresses the evidence found at the search which was the handgun.

App. at 29.

The Commonwealth filed an interlocutory appeal to the Court of Appeals of Kentucky which affirmed suppression. App. 21-27. The Commonwealth then filed a motion for discretionary review in the Supreme Court of Kentucky which vacated and remanded the case to the Court of Appeals for consideration in light of *Thornton v. United States*, 541 U.S. 615 (2004). The Court of Appeals subsequently reversed, finding Mr. Rainey to have been a "recent occupant" of the vehicle for the purposes of the search incident to arrest exception without discussing or defining the limits of recent occupancy. App. 17-20. The Supreme Court of Kentucky thereafter granted Mr. Rainey's motion for discretionary review and affirmed the Court of Appeals in a plurality opinion. App. 1-16.

The facts of this case present the type of unconstitutional expansion of the search incident to arrest exception anticipated by both the concurring and dissenting opinions in *Thornton*, *supra*.

In the early morning hours of January 19, 2002, Louisville Metro Police Officers Stephen Glauber and Kenneth Wilkins were on foot patrol in a West Louisville housing project when they noticed a green Ford Explorer traveling westbound about fifty feet away from their position. Videotape of July 15, 2002 Suppression Hearing (hereafter "Supp. hearing"), 11:41:25-11:41:57. Officer Glauber testified that he and his partner saw the vehicle through the courtyard of the housing project, but acknowledged that it was unlikely the driver of the vehicle could

see the officers because of his distance and vantage point. Supp. hearing, 11:42:25-11:42:42.

The officers observed the Ford Explorer travel another one hundred-fifty to two hundred feet before the vehicle parked in a parking space on the side of the road. Supp. hearing, 11:42:50-11:43:25. The petitioner, William Rainey, then exited the vehicle, closed and locked his driver's side door, walked away from the vehicle, and called out to some nearby residents. Supp. hearing, 11:37:49-11:38:22. The officers were still not visible to Rainey because they remained hidden behind a courtyard entrance.

Mr. Rainey walked about fifty to seventy feet away from the vehicle before the officers came from behind the courtyard and stopped Rainey. Supp. hearing, 11:42:00-11:42:37. Upon questioning Rainey, Officer Glauber suspected Rainey might be under the influence of alcohol so he attempted a field sobriety test. At some point in time later, Officer Glauber placed Mr. Rainey under arrest for driving under the influence of alcohol and reckless driving. Supp. hearing, 11:38:30-11:38:58.

Mr. Rainey was standing anywhere from fifty to seventy feet away from the Ford Explorer at the time of the arrest. Indeed, Officer Glauber would later testify that Mr. Rainey was so far away from the vehicle that Mr. Rainey could not have accessed the Ford Explorer or its contents. Supp. hearing, 11:44:35-11:44:52.

Nevertheless, after arresting and handcuffing petitioner, Officer Glauber retrieved the keys to the Ford Explorer from Rainey's pocket, led Mr. Rainey the entire distance back to the vehicle, unlocked the driver's side door with the keys, and searched the vehicle. Supp. hearing,

11:45:10-11:45:47. Officer Glauber then found a handgun underneath the driver's seat which resulted in the additional charges of possession of a firearm by a convicted felon and being a persistent felony offender in the first degree.

The Commonwealth offered no testimony as to how much time elapsed between the moment Officers Glauber and Wilkins first saw Rainey exit the vehicle and the time they first initiated contact with him. The Commonwealth also offered no testimony as to how long Officer Glauber questioned Mr. Rainey or attempted the field sobriety test after initial contact. Thus, there is no evidence whatsoever of petitioner's temporal proximity to the vehicle at or before the arrest. Indeed, the Supreme Court of Kentucky dispensed with any need to prove temporal proximity, noting:

> Although no evidence was offered in this case concerning Appellant's temporal relationship to his vehicle, and although officer testimony revealed that the officers did not fear for their safety and conceded that Appellant was so far from his vehicle that it was unlikely he could have accessed it, we are not persuaded that the search was unlawful.

App. at 10.

The Supreme Court of Kentucky further authorized a search of a former occupant's vehicle even when it is impossible for the arrestee to access any part of vehicle:

> In essence, Appellant makes the same argument here that the defendant in *Thornton* made, to wit, that the right of an arresting officer to search the passenger compartment of a vehicle

> terminates when the arrestee cannot access the vehicle to destroy evidence or access a weapon. We cannot accept such a proposition.

App. at 9.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD REQUIRE PROOF OF A FORMER OCCUPANT'S TEMPORAL AND SPATIAL PROXIMITY TO THE AUTOMOBILE AT THE TIME OF ARREST IN ORDER TO JUSTIFY THE SEARCH OF THE AUTOMOBILE AS INCIDENT TO THE ARREST.

In the wake of *Thornton v. United States*, 541 U.S. 615 (2004), the courts are left with little guidance to differentiate between a "recent occupant" and "former occupant" of a vehicle for the purpose of applying the search incident to arrest exception to the Fourth Amendment warrant requirement. There is no better example than the opinion of the Supreme Court of Kentucky.

While *Thornton* acknowledged that an arrestee's status as a recent occupant "may turn on his temporal or spatial relationship to the car at the time of the arrest and search" *Thornton*, 541 U.S. at 622, the Supreme Court of Kentucky interpreted the phrase to mean that the government must prove only temporal *or* spatial proximity:

> However, the Commonwealth notes, and we agree that when the United States Supreme Court chose the words "temporal *or* spatial," the Court must have meant that whether a person is a "recent occupant" would not be determined only on his spatial relationship to the vehicle at the time of the arrest and search, but could also be

> based solely on his temporal relationship to the vehicle.

App. at 10 (Emphasis in original).

Following such an interpretation, *Thornton* would uphold a vehicle search where the former occupant is miles away from the vehicle at the time of the arrest if the government need only prove temporal proximity. Similarly, if distance is the only factor, police making an in-house arrest may search an arrestee's vehicle located in a nearby driveway – despite the fact that hours, days, or weeks may have passed since the arrestee last occupied the automobile. The latter hypothetical is particularly intriguing when one considers that police are limited to a search of the area within the arrestee's "immediate control" while effectuating an in-house arrest under *Chimel v. California*, 395 U.S. 752 (1969).

*Thornton* requires proof of a former occupant's temporal *and* spatial proximity to his vehicle at the time of the arrest or else the decision creates absurd and unconstitutional results.

Indeed, *Thornton* ostensibly represents nothing more than an application of the bright-line rule recognized in *New York v. Belton*, 453 U.S. 454 (1981). In *Belton*, this Court allowed officers to search the entire passenger compartment of the vehicle incident to the arrest of its occupant. Belton was pulled over for speeding. When the officer saw a small quantity of marijuana on the floor of Belton's car, he arrested Belton for possession of marijuana. The officer then searched the passenger compartment of the car and, inside the pocket of a jacket on the back seat, found cocaine. The Court held that "when a policeman has made a lawful custodial arrest of the

occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460.

In applying *Belton* to the facts, *Thornton* envisioned a former occupant so close to the vehicle at the time of arrest that the former occupant's proximity would be tantamount to occupancy. Such a former occupant – close in both distance and time – should be considered a "recent occupant." This Court stated:

> In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested. A custodial arrest is fluid and "the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty" [citation omitted]. . . . The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation. . . . [A]n arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search. . . . Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment. . . . So long as an arrestee is the sort of "recent occupant" of a vehicle

> such as petitioner was here, officers may search that vehicle incident to the arrest.

*Thornton*, 541 U.S. at 621-24.

The analysis in *Thornton* is fact specific. Indeed, the opinion ends with a very important caveat: "[s]o long as an arrestee *is the sort of 'recent occupant' of a vehicle such as petitioner was here*, officers may search that vehicle incident to arrest." *Thornton*, 541 U.S. at 623-624 (Emphasis added).

The Defendant in *Thornton* was standing next to his vehicle at the time of arrest and he conceded close proximity to his vehicle both temporally and spatially. *Thornton*, 541 U.S. at 622 n.2. In contrast, Mr. Rainey was at least fifty feet away from his vehicle and an unknown amount of time had elapsed after occupying the vehicle. Unlike *Thornton*, Mr. Rainey never conceded he was a recent occupant of his vehicle, and the Commonwealth never bothered to prove Mr. Rainey's temporal proximity to the vehicle. Mr. Rainey's status at the time of arrest was in no way tantamount to occupancy.

Petitioner can find no case after *Thornton* which allows a vehicle search under factual circumstances like those found in the present case. However, at least two recent cases refuse to extend the reasoning of *Thornton* in the same manner as the Supreme Court of Kentucky. *See State v. Gant*, 143 P.2d 379 (Ariz. App. 2006); *United States v. Laughton*, 437 F.Supp.2d 665 (E.D. Mich. 2006). Other cases refuse to justify searches as incident to arrest where the arrestees are the same or greater distance away from their vehicles than Rainey was at the time of arrest. *See United States v. Pittman*, 411 F.3d 813 (7th Cir. 2005) (search of vehicle not incident to arrest under *Thornton*

where defendant arrested approximately a block away); *State v. Rathbun*, 101 P.3d 119 (Wash. App. 2004) (defendant not "recent occupant" under *Thornton* where defendant was arrested forty to sixty feet away). At least one court refused to apply the search incident to arrest exception where the state proved an arrestee's spatial but not temporal proximity to the vehicle at the time of arrest. *See Slone v. State*, 902 So.2d 852 (Fla. App. 2005) (where defendant was ten to fifteen feet away from vehicle but state failed to prove defendant was "recent occupant" under *Thornton*, search of vehicle not justified).

Finally, requiring the government to prove a former occupant's temporal *and* spatial proximity to the vehicle is consistent with the government's burden of establishing that the warrantless search falls within one of the specifically established and well-delineated exceptions to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The requirement is also consistent with a fundamental principle of Fourth Amendment analysis which holds that exceptions to the warrant requirement must be narrowly construed. *See Mincey v. Arizona*, 437 U.S. 385 (1978).

## II. A WARRANTLESS SEARCH OF AN AUTOMOBILE IS NOT JUSTIFIED ONCE THE FORMER OCCUPANT IS RESTRAINED BY HANDCUFFS AND WHERE THE ARRESTING OFFICER TESTIFIES THAT THE FORMER OCCUPANT NEVER POSED A DANGER OF ACCESSING THE AUTOMOBILE.

The two historical rationales for the search incident to arrest exception are: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. *See Knowles v. Iowa*,

525 U.S. 113, 116 (1998); *Chimel v. California*, 395 U.S. 752, 762-763 (1969).

Neither rationale justifies a search of a vehicle once a former occupant of a vehicle is handcuffed and the arresting officer admits that the former occupant poses no danger of accessing the vehicle either before or after the former occupant is restrained. Where neither rationale for the search incident to arrest exception is present, the exception should not apply. *See, e.g., State v. Gant*, 143 P.2d 379 (Ariz. App. 2006) (where arrestee placed in patrol car during search of arrestee's vehicle and there is no risk arrestee could access vehicle, search of vehicle not justified as incident to arrest).

While the Supreme Court of Kentucky indicated that this argument is the same one the defendant made in *Thornton*, App. at 9, it is clear that is not the case. Although Justices Scalia and Ginsburg addressed the issue of whether officers may conduct a search incident to arrest once the arrestee is handcuffed and secured in the back of a patrol car, a majority of this Court specifically declined to reach the issue because it had not been briefed by the parties. *Thornton*, 541 U.S. at 624 n.4 ("Whatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case in which to address them."); *Thornton*, 541 U.S. at 625 (O'Connor, J., concurring) (declining to reach the issue "in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit").

Surely, the rationales underlying the search incident to arrest exception were not made irrelevant by virtue of this Court's decisions in *Belton* and *Thornton*. Indeed, in

*Belton*, the lone police officer searched the vehicle contemporaneously with his arrest of the four occupants of the vehicle – none of whom was secured in a patrol vehicle or by handcuffs. Thus *Chimel's* twin rationales were quite obvious in that case. *Thornton* merely applied *Belton*, and as indicated previously, this Court refused to consider whether either or both of *Chimel's* rationales must be present before police may justify a search incident to arrest.

This case presents an excellent opportunity for this Court to pick up where *Thornton* left off.

Here, Officer Glauber judicially admitted that Mr. Rainey could not access any part of his vehicle either before or after the arrest. Indeed, after the arrest, Mr. Rainey could not access the vehicle because Rainey was in handcuffs. Even so, any danger to the police officers at that point (whether real or theoretical) arose from the search of the vehicle with Mr. Rainey standing next to them – not from the arrest some fifty to seventy feet away from the vehicle. Thus, the police officers in the present case actually put themselves in greater danger by escorting Mr. Rainey to the vehicle and conducting the search than if they had just arrested Mr. Rainey and escorted him to the police station. Such a result cannot be condoned if the underlying rationales of the search incident to arrest exception continue to have any meaning.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of Kentucky.

Respectfully submitted,

KEVIN C. BURKE
*Counsel of Record*
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

*Counsel for Petitioner*

*Of Counsel*
KEITH E. KAMENISH
1916 Kentucky Home Life Building
239 South Fifth Street
Louisville, Kentucky 40202
(502) 584-1402

197 S.W.3d 89

RENDERED: MAY 18, 2006
TO BE PUBLISHED

**Supreme Court of Kentucky**

2005-SC-000185-DG

WILLIAM RAINEY — APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. 2002-CA-002070-MR
JEFFERSON CIRCUIT COURT NO. 2002-CR-912

COMMONWEALTH OF KENTUCKY — APPELLEE

**OPINION OF THE COURT BY JUSTICE SCOTT**

AFFIRMING

This case comes to us on discretionary review of the Court of Appeals' opinion, reversing the Jefferson Circuit Court's order suppressing the introduction of a handgun found in Appellant William Rainey's vehicle following his arrest. Appellant, William Rainey, had sought to suppress the evidence obtained by the police from his vehicle without a warrant and argued that no valid exception to the search warrant requirement was proven. The Jefferson Circuit Court agreed and suppressed the evidence. The Court of Appeals initially affirmed, and the Commonwealth sought review in this Court. However, at that time, the United States Supreme Court had just issued its opinion in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). Thus, we vacated and remanded the case back to the Court of Appeals to consider the issue in light of *Thornton, supra.* Accordingly, the Court of Appeals then reversed the trial court's order

suppressing the evidence, finding Appellant to have been a "recent occupant" of the vehicle and that the search was lawful as being incident to arrest. We granted Appellant's subsequent request for discretionary review, and for the reasons set forth below, we affirm the Court of Appeals.

## I. Facts

On January 29, 2002, Louisville Metro Police Officers Steven Glauber and Kenneth Wilkins were on foot patrol in the Beecher Terrace Housing Project in Louisville, Kentucky, when they observed Appellant Rainey's vehicle traveling at a high rate of speed over several speed bumps in the vicinity. From a distance, the officers watched Appellant park his vehicle and then exit, shouting loudly at nearby residents.

By the time the officers initiated contact with Appellant, he had crossed the street and was approximately fifty feet away from his vehicle. Upon approaching Appellant, the officers noticed the smell of alcohol and observed that Appellant was unsteady on his feet and was slurring his speech. Appellant told the officers he had been drinking and had just been thrown out of a local bar. The officers attempted to conduct a field sobriety test, but Appellant refused. He was subsequently arrested and charged with operating a motor vehicle under the influence of intoxicants (DUI) pursuant to KRS 189A.010 and with reckless driving pursuant to KRS 189.290.

After handcuffing Appellant, the officers walked him back to his vehicle and proceeded to unlock the vehicle and search the passenger compartment. A .38 caliber handgun was found under the driver's seat. Appellant was then charged with illegal possession of a handgun by a convicted

felon (KRS 527.040) and with being a persistent felony offender in the first degree (KRS 532.080).

Appellant Rainey then filed a motion to suppress the handgun seized from his vehicle, the history of which has been previously recounted.

## II. Analysis

Our analysis in the context of the Fourth Amendment to the United States Constitution must begin with the understanding that "section 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment." *LaFollette v. Commonwealth,* 915 S.W.2d 747, 748 (Ky. 1996). That being said, the analysis for this particular case involves case law as it has developed in both our state courts and federal courts concerning Fourth Amendment jurisprudence.

> [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" "[T]he burden is on those seeking the exemption to show the need for it." . . . [T]he values [inherent in the Fourth Amendment] were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won – by legal and constitutional means in England, and by revolution on this continent – a right of personal security against

> arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

*Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (citations omitted). Most relevant to our review of the issue at bar is the search incident to arrest exception.[1]

A search incident to an arrest is an exception to the general rule requiring a warrant prior to searches and seizures pursuant to the Fourth Amendment of the United States Constitution and applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

> This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

*United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973).

---

[1] Another exception, though not addressed by the parties and not utilized by the officers in this case, is the warrantless "inventory" search under the inevitable discovery doctrine. Seventh Circuit Judge Posner discussed this exception in *United States v. Pittman,* 411 F.3d 813, 817 (7th Cir. 2005), wherein he stated that "[w]arrantless inventory searches of vehicles are lawful if conducted pursuant to standard police procedures aimed at protecting the owner's property and protecting the police from the owner's charging them with having stolen, lost, or damaged his property." (Citation omitted).

In analyzing the rationale behind this exception, the United States Supreme Court has stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . .* There is ample justification, therefore, for a search of the arrestee's person *and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.*

*Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969) (emphasis added). Although *Chimel* involved the search of the defendant's home incident to his arrest, the United States Supreme Court has extended its holding to the warrantless search of an automobile.

In *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the defendant was pulled over pursuant to a lawful traffic stop and was then arrested for possession of marijuana. After placing Belton (and three others with him) under arrest, the lone officer, with the arrested men standing next to the car, searched the vehicle and found other contraband inside the defendant's jacket pocket, which had been left in the back seat of the vehicle. The pocket had been zipped, and thus the evidence was only

discovered after the officer unzipped the pocket. It was only after the search that Belton and the others were placed in the patrol car and transported to the police station. The United States Supreme Court held that the reasoning behind the search incident to arrest exception announced in *Chimel* could be applied to allow the warrantless search of an automobile made contemporaneously to the lawful arrest of its occupant.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. *A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.*

*Robinson,* 414 U.S. at 235, 94 S.Ct. at 476, *quoted in Belton,* 453 U.S. at 461, 101 S.Ct. at 2864 (emphasis added).

Finally, in *Thornton, supra,* the rule of *Belton* was applied to a defendant who was not in the vehicle at the time of his arrest (i.e. he was not an "occupant"). In *Thornton,* the defendant had avoided pulling along side a police cruiser as the two traveled down the road. The officer became suspicious after running the license plate on the car and discovering that the vehicle did not match the vehicle to which the license plate was registered. The officer saw the defendant then pull into a parking lot and exit the vehicle before the officer initiated contact. Upon approaching the defendant, the officer noticed his nervousness and asked

to pat down the defendant. The defendant agreed, and the search yielded narcotics. The officer then arrested Thornton and placed him in the back of the patrol car. The search of the vehicle after his arrest revealed a handgun under the driver's seat.

In its decision, the United States Supreme Court once again extended the rationale of *Belton,* holding that once an officer lawfully arrests an automobile's "recent occupant," the officer may search the automobile's passenger compartment as a search incident to arrest. *Thornton,* 541 U.S. at 621-23, 124 S.Ct. at 2131-32. In so ruling, the Supreme Court noted that

> while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.

*Id.* at 622, 124 S.Ct. at 2131-32. The Supreme Court declined to address whether *Belton* should be limited to circumstances where the recent occupant was within "reaching distance" of the vehicle or its passenger compartment. However, on the issue of the arrestee's proximity to the vehicle, the Supreme Court acknowledged:

> It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton.* The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not

> within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

*Id.* at 622-23, 124 S.Ct. at 2132. Moreover, prior to the United States Supreme Court's holding in *Thornton,* our Court of Appeals aptly held that "in the search incident to arrest context, the distance between the arrestee and the area to be searched is not dispositive of the issue. Whether a search is reasonable as incident to a lawful arrest depends on the particular circumstances involved." *Davis v. Commonwealth,* 120 S.W.3d 185, 194 (Ky. App. 2003).

Similarly, the Sixth Circuit Court of Appeals has also recognized that the accessibility of the arrestee to items in his vehicle is not a basis for justifying or denying the search.

> [T]he right to search an item incident to arrest exists even if that item is no longer accessible to the defendant at the time of the search. *So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to search incident to an arrest.*

*Northrop v. Trippett,* 265 F.3d 372, 379 (6th Cir. 2001) (citing *Belton,* 453 U.S. at 461-63, n. 5, 101 S.Ct. at 2864-65, n. 5) (emphasis added). Under this same line of reasoning, the Sixth Circuit has also held that even though a search may not be authorized under *Belton, i.e.* as a search of a passenger compartment of a vehicle incident to the arrest of the occupant of that vehicle, it may nonetheless be a valid search incident to arrest because such a search

"encompasses the search of anything within the area which is, *or was,* within the 'immediate control' of the defendant." *United States v. Hatfield,* 815 F.2d 1068, 1071 (6th Cir. 1987), *quoted in United States v. White,* 131 Fed.Appx. 54, 58 (6th Cir. 2005) (emphasis in original).

Thus, while temporal and spatial proximity to the automobile are certainly factors to be considered in determining the arrestee's status as a "recent occupant" for purposes of *Belton* and *Thornton,* they are not necessarily dispositive. Indeed, the defendant in *Thornton, supra,* was handcuffed and placed in the back of a squad car at the time of the search. Appellant urges this Court to find that his spatial proximity to the vehicle was such that the concerns of *Belton* are not applicable. In essence, Appellant makes the same argument here that the defendant in *Thornton* made, to wit, that the right of an arresting officer to search the passenger compartment of a vehicle terminates when the arrestee cannot access the vehicle to destroy evidence or access a weapon. We cannot accept such a proposition.

There may be times when officers do not immediately approach a suspect, either for safety concerns for the public in the area or because it would be more effective to conceal their presence. Officers should be free to make these decisions. If officers were required to initiate contact while the suspect was still in the vehicle or after the suspect had just exited the vehicle in order to ensure their ability to search the automobile for discarded contraband or weapons, their safety may be compromised or incriminating evidence may be placed at risk for concealment or destruction. The United States Supreme Court has noted identical concerns. *See Thornton,* 541 U.S. at 621-22, 124

S.Ct. at 2131 (finding "[t]he Fourth Amendment does not require such a gamble").

In any event, we note that the Court in *Thornton* declined to define the term "recent occupant" and stated that whether someone could be considered such for purposes of *Belton* "*may* turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 622, 124 S.Ct. at 2131-32 (emphasis added). Thus courts are left with little guidance in determining an arrestee's status as a "recent occupant." However, the Commonwealth notes, and we agree, that when the United States Supreme Court chose the words "temporal *or* spatial," the Court must have meant that whether a person was a "recent occupant" would not be determined only on his spatial relationship to the vehicle at the time of the arrest and search, but could also be based solely on his temporal relationship to the vehicle.

Although no evidence was offered in this case concerning Appellant's temporal relationship to his vehicle, and although officer testimony revealed that the officers did not fear for their safety and conceded that Appellant was so far from his vehicle that it was unlikely he could have accessed it, we are not persuaded that the search was unlawful. The officers here observed Appellant as he drove past them at an excessive rate of speed for the circumstances. The officers observed him exit the vehicle and walk as far as fifty feet from the vehicle before they were able to reach him to initiate contact. While there is no hard and fast definition of what constitutes "recent" both

in time and distance,[2] on the facts of this case, Appellant was a "recent occupant" and was sufficiently close to the vehicle, in both time and space, for the concerns of *Belton* and *Thornton* to be applicable. We see no reason to distinguish *Thornton* on the facts of this case. Accordingly, we affirm the Court of Appeals in finding that the suppression of the evidence was erroneous.

Graves and Wintersheimer, JJ., concur. Cooper, J., concurs by separate opinion, with Johnstone, J., joining that concurring opinion. Roach, J., also concurs by separate opinion, with Lambert, C.J., joining that concurring opinion.

---

**CONCURRING OPINION BY JUSTICE COOPER**

In *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the United States Supreme Court essentially held that a search incident to a lawful arrest includes a search of any vehicle in which the arrested person was a "recent occupant." *Id.* at 623-24, 124 S.Ct. at 2132. In my view (and that of five members of the Court that decided *Thornton*), the reasoning supporting this departure from previously settled law with respect to automobile searches is seriously flawed. Nevertheless, *Thornton* is on all fours with the facts of this case. As I stated in my concurrence in *Penman v. Commonwealth,*

---

[2] Justice Stevens, in his dissenting opinion in *Thornton v. United States,* 541 U.S. 615, 636, 124 S.Ct. 2127, 2140, 158 L.Ed.2d 905 (2004), recognized the majority's failure to provide such a definition, wherein he stated that "we are not told how recent is recent, or how close is close, perhaps because in this case 'the record is not clear.'" (Citation omitted).

2004-SC-0726-MR, ___ S.W.3d ___ (Ky. May 18, 2006), because (and only because) I consider it important for law enforcement purposes that consistency be maintained between Kentucky and federal law on Fourth Amendment issues, I reluctantly concur in the majority opinion.

Johnstone, J., joins this concurring opinion.

---

**CONCURRING OPINION BY JUSTICE ROACH**

I concur in the result reached by the majority. I write separately, however, to express my concern with the majority's reliance on *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996), for the proposition that Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment. *LaFollette* does indeed include such a statement. *Id.* at 748. For the reasons expressed herein, however, I would be willing to reconsider *LaFollette* in the appropriate case.

To begin, *LaFollette*'s cited authority does not stand for the claimed proposition. *LaFollette* notes that Section 10 and the Fourth Amendment are similar, thus the United States Supreme Court's interpretation of the Fourth Amendment, though not binding, is certainly informative and persuasive in our interpretation of Section 10. *LaFollette* follows this rather unremarkable proposition with the following language:

> Stated otherwise, Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment. *Estep v. Commonwealth*, Ky., 663 S.W.2d 213 (1983).

915 S.W.2d at 748.

However, *Estep* does not actually state that Section 10 of the Kentucky Constitution provides no greater protection than the Fourth Amendment. In fact, it makes no statement that would even approach that proposition. *Estep* simply adopted the rule of *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), concerning searches of vehicles and their compartments and contents. *Id.* at 215. Rather than stating the broad proposition that Section 10 provides protection identical to federal Fourth Amendment jurisprudence, this Court simply observed that the rule of *Ross* was "in harmony with Section 10. . . ." *Id.* In essence, *Estep* held that in a particular instance, Section 10 provided the same protection as the Fourth Amendment. But nowhere does *Estep* state that Section 10 is only coextensive with the Fourth Amendment. As we had only recently noted when *LaFollette* was rendered, "this Court's decisions have not been entirely consistent as to whether Section 10 and the Fourth Amendment are parallel. . . ." *Crayton v. Commonwealth,* 846 S.W.2d 684, 687 (Ky. 1992). *Crayton* then noted three cases, including *Estep,* where the Court had held in specific situations, and again without stating a broad proposition, that the relevant federal rule was in accord with Section 10. *LaFollette* committed the error of deriving an absolute, general rule from a specific situation. Such generalization, absent further explication, does not withstand scrutiny. *Cf. Commonwealth v. Cooper,* 899 S.W.2d 75, 77-78 (Ky. 1995) (holding that Ky. Const. § 11 provides no more protection than the Fifth Amendment, but doing so with extensive explanation of why the two provisions provide only coextensive protection).

While it is likely that Section 10 of the Kentucky Constitution provides no greater protection than the Fourth

Amendment to the United States Constitution, I do not necessarily believe that we are bound to interpret Section 10 in the same manner as the United States Supreme Court has interpreted the Fourth Amendment. Our case law clearly contemplates the possibility that our own constitutional protections could diverge from those in the federal constitution. *See Cooper,* 899 S.W.2d at 77-78 ("From time to time in recent years this Court has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States. However, when we have differed from the Supreme Court, it has been because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent."). Obviously, the United States Supreme Court's interpretation of the Fourth Amendment represents a minimum amount of protection to which criminal defendants are entitled. And I acknowledge that given the linguistic similarity between the Fourth Amendment and Section 10, we should give great weight to the United States Supreme Court's interpretation of the federal amendment. *See Crayton,* 846 S.W.2d at 687. We have even stated what might amount to a preference for not recognizing different protection under the state constitution. *See Holbrook v. Knopf,* 847 S.W.2d 52, 55 (Ky. 1992) (noting in the context of determining whether our constitutional protections are only coterminous with those of the federal constitution that "[w]e have no intention that such cases should encourage lawsuits espousing novel theories to revise well-established legal practice and principles").

However, if we were to determine that Section 10 of the Kentucky Constitution, as applied to a specific case, contained more protections than the United States Supreme Court had declared is provided by the Fourth Amendment, I

believe that we should honor our own constitution. The issue could arise in a situation where the United States Supreme Court has interpreted the Fourth Amendment in such a way as to formulate a legal rule that is inconsistent with the original understanding of Section 10 of the Kentucky Constitution. In such a case, we should decline to defer to the United States Supreme Court's interpretation of the Fourth Amendment when interpreting our own constitutional provision, which is an independent legal protection with a different, albeit related, history and origin. To do otherwise would violate our oath of office by which we are bound to "support the Constitution of the United States *and* the Constitution of this Commonwealth. . . ." Ky. Const. § 228 (emphasis added). Our obligation to engage in independent analysis under our own constitution is even more apparent where the relevant federal precedent is weak.

Thus, on the particular issue before us, I note that there is some question whether *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127 (2004), is a constitutionally sound decision. I agree with Justices Scalia, O'Connor, and Ginsburg that *Thornton* is on shaky ground. *See id.* at 624, 124 S.Ct. at 2133 (O'Connor, J., concurring) (writing "separately to express [her] dissatisfaction with the state of the law in this area" and noting that *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), on which Thornton was premised, already had a "shaky foundation"); *id.* at 628-29, 124 S.Ct. at 2135 (Scalia, J., concurring, joined by Ginsburg, J.) ("[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car

to see what they might find. I agree entirely with that assessment." (internal citation and quotation marks omitted)). Moreover, *Thornton* is not the strongest precedent to begin with, as only four justices – a minority of the Court – joined all of the reasoning of the opinion of the Court. Though we are bound by the Court's plurality opinion insofar as it creates a minimum amount of protection, to blindly attach its rule to our own Section 10, given the disparate approaches urged by the members of the Court, makes little sense. If Section 10 charts a clearer course, we should follow it.

However, with all this said I concur in the result of the majority opinion. The parties have only argued within the parameters of *Thornton*'s plurality rule, in effect, agreeing that Section 10 provides only as much protection as the Fourth Amendment. While I welcome the day that we might revisit *LaFollette,* I simply cannot do so without full briefing and argument of such an important issue. *See Thornton,* 541 U.S. at 625, 124 S.Ct. at 2133 (O'Connor, J., concurring) ("I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit."). This case simply does not squarely present the issue of whether Section 10 requires a rule as to recent occupants of automobiles different from that which the United State Supreme Court has applied under the Fourth Amendment. For that reason, I concur.

Lambert, C.J., joins this concurring opinion.

2005 WL 327063

RENDERED: FEBRUARY 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002070-MR

COMMONWEALTH OF KENTUCKY APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2004-SC-212-D

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-000912

WILLIAM RAINEY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES

TAYLOR, JUDGE: This matter is before us on remand from the Kentucky Supreme Court by Opinion and Order entered December 8, 2004. The Supreme Court vacated our Opinion rendered February 13, 2004, and ordered us to reconsider it in light of *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). Having considered *Thornton*, we issue the following opinion.

The Commonwealth of Kentucky brings this interlocutory appeal from a September 5, 2002, order of the Jefferson

Circuit Court. Kentucky Revised Statutes (KRS) 22A.020. We reverse and remand.

The facts are not in dispute. Officer Stephen Glauber and Officer Kenneth Wilkins were on foot patrol in a Louisville neighborhood when they spotted William Rainey driving at a high rate of speed. Glauber and Wilkins observed Rainey parking his vehicle, exiting his vehicle, and shouting loudly at nearby residents. By the time the officers reached Rainey, he was approximately fifty feet from his vehicle. Glauber and Wilkins recognized that Rainey was "unsteady on his feet, smelled strongly of alcoholic beverages, and was slurring his speech." Rainey told the officers that he had been thrown out of a bar and had been drinking. Rainey refused a field sobriety test; however, Glauber and Wilkins deduced that Rainey was intoxicated. Rainey was arrested and charged with operating a motor vehicle under the influence of intoxicants (DUI) (KRS 189A.010) and reckless driving (KRS 189.290).

Following the arrest, Glauber and Wilkins searched Rainey's vehicle and found a handgun concealed beneath the driver's seat. Rainey was charged with the additional crimes of possession of a firearm by a convicted felon (KRS 527.040) and with being a persistent felony offender in the first degree (KRS 532.080).

Rainey filed a motion to suppress the handgun seized from his vehicle. The circuit court granted the motion and suppressed the introduction of the handgun into evidence. This interlocutory appeal follows.

The Commonwealth contends the search of Rainey's vehicle was proper as a search made incident to an arrest. We agree.

A search incident to an arrest provides an exception to the general rule that searches and seizures must be accompanied by a warrant. The exception stands for the proposition:

> [w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

*Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). The incident to arrest exception has been extended to a warrentless search of an automobile made contemporaneously to the lawful arrest of its occupant. *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), *cited with approval in Commonwealth v. Ramsey*, 744 S.W.2d 418 (Ky. 1987).

In *Thornton*, the United States Supreme Court has now held that a police officer may search a vehicle's passenger compartment incident to the lawful arrest of a "recent occupant" of the vehicle. The Supreme Court clearly rejected the contention that a police officer must first initiate contact with the suspect while he is still an occupant of the vehicle. Under the facts of our case, it is clear that Rainey was a recent occupant of the vehicle, and thus, the police properly searched the passenger compartment of his vehicle under the search incident to arrest exception. *See Thornton*, 541 U.S. 615. Accordingly, we conclude the circuit court erred by suppressing the introduction of the handgun into evidence.

For the foregoing reasons, the order of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Albert B. Chandler III
Attorney General of Kentucky

Teresa Young
Special Assistant
Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Keith E. Kamenish
Louisville, Kentucky

2005 WL 327063

RENDERED: February 13, 2004; 2:00 p.m.
TO BE PUBLISHED

**(OPINION RENDERED OCTOBER 31, 2003 WITHDRAWN)**

Commonwealth Of Kentucky

Court of Appeals

No. 2002-CA-002070-MR

COMMONWEALTH OF KENTUCKY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-000912

WILLIAM RAINEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER AND TAYLOR, JUDGES.

TAYLOR, JUDGE: The Commonwealth of Kentucky brings this interlocutory appeal from a September 5, 2002, order of the Jefferson Circuit Court. Kentucky Revised Statutes (KRS) 22A.020. We affirm.

The facts are not in dispute. Officer Stephen Glauber and Officer Kenneth Wilkins were on foot patrol in a Louisville neighborhood when they spotted William Rainey driving at a high rate of speed. Glauber and

Wilkins observed Rainey parking his vehicle, exiting his vehicle, and shouting loudly at nearby residents. By the time the officers reached Rainey, he was approximately fifty feet from his vehicle. Glauber and Wilkins recognized that Rainey was "unsteady on his feet, smelled strongly of alcoholic beverages, and was slurring his speech." Rainey told the officers that he had been thrown out of a bar and had been drinking. Rainey refused a field sobriety test; however, Glauber and Wilkins deduced that Rainey was intoxicated. Rainey was arrested and charged with operating a motor vehicle under the influence of intoxicants (DUI) (KRS 189A.010) and reckless driving (KRS 189.290).

Following the arrest, Glauber and Wilkins searched Rainey's vehicle and found a handgun concealed beneath the driver's seat. Rainey was charged with the additional crimes of possession of a firearm by a convicted felon (KRS 527.040) and with being a persistent felony offender in the first degree (KRS 532.080).

Rainey filed a motion to suppress the handgun seized from his vehicle. The circuit court granted the motion and suppressed the introduction of the handgun into evidence. This interlocutory appeal follows.

The Commonwealth asserts the search of Rainey's vehicle was proper as a search made incident to arrest. We disagree.

A search "incident to arrest" provides an exception to the general rule that searches and seizures must be accompanied by a warrant. The exception stands for the proposition that:

> [w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in

> order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

*Chimel v. California,* 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The exception applies only to those areas "within [the] immediate control" of the arrestee. *Id.* at 763. The incident to arrest exception has been extended to a warrantless search of an automobile made contemporaneously to the lawful arrest of its occupant. "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), *cited with approval in Commonwealth v. Ramsey,* Ky., 744 S.W.2d 418 (1987).

In the case *sub judice,* Rainey was about fifty feet from his vehicle when the officers made first contact with him; it is important to emphasize that Rainey was not an occupant of the vehicle when the officers first encountered him. These facts are strikingly similar to those of *United States v. Strahan,* 984 F.2d 155 (6th Cir. 1993). Therein, Strahan was some thirty feet from his vehicle when the police made initial contact with him. The Sixth Circuit Court of Appeals held that the ensuing search of Strahan's vehicle was not justified under the search incident to arrest exception. The Court explained:

> The Supreme Court addressed the applicability of *Chimel* to automobile search cases in *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). In that case, the Supreme Court held that "when a policeman has made a

lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460, 101 S.Ct. at 2864. *Belton* established a bright-line rule for automobile search cases. W. LaFave, *Search and Seizure* § 7.1 at 136 (2d ed. 1987). When an occupant of a vehicle is arrested, the police may lawfully search the passenger compartment.

In *United States v. White,* 871 F.2d 41 (6th Cir. 1989), this court held that *Belton* governs when the arrestee is removed from the car prior to the time of the search. *White* comports with other circuits that have addressed this issue. *See, e.g., United States v. Karlin,* 852 F.2d 968, 971-72 (7th Cir. 1988), *cert. denied,* 489 U.S. 1021, 109 S.Ct. 1142, 103 L.Ed.2d 202 (1989); *United States v. Cotton,* 751 F.2d 1146, 1149 (10th Cir. 1985); *United States v. McCrady,* 774 F.2d 868, 871-72 (8th Cir. 1985). *White,* in following *Belton,* applies only where the police initiate contact while the defendant is within his automobile, but subsequently remove the arrestee. Indeed, *Belton* clearly limits its application to only those settings where an officer makes a custodial arrest "of the *occupant* of an automobile. . . . " *Belton,* 453 U.S. at 460, 101 S.Ct. at 2864.

Because Strahan was approximately thirty feet from his vehicle when arrested, *White* and *Belton* are inapplicable. The police did not make an arrest of an occupant of a vehicle. Accordingly, the *Chimel* test governs. Because the passenger compartment of the vehicle was not within Strahan's "immediate control" at the time of the arrest, the search was not incident to a lawful arrest, and suppression is proper.

*Id.* at 159 (footnote omitted).

Although not bound, we are persuaded by the reasoning expounded in *Strahan* and adopt same herein. As Rainey was some fifty feet from his vehicle before the officers initiated first contact, we conclude the search incident to arrest exception inapplicable. To apply such exception, the police must first initiate contact with the suspect while he is still within the confines of the vehicle. As such, we hold the search of Rainey's vehicle was not justified under the search incident to arrest exception.

The Commonwealth also contends the search of Rainey's vehicle was justified under the automobile exception to the search warrant requirement.

Under the "automobile exception", a motor vehicle may be searched without a warrant so long as the vehicle is mobile and probable cause exists that contraband or evidence of a crime is within the vehicle. *See Maryland v. Dyson,* 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999); *Clark v. Commonwealth,* Ky. App., 868 S.W.2d 101 (1993). "Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained in the automobile." *Clark* at 106-107. It is insufficient to look at circumstances in retrospect and find probable cause. *Sampson v. Commonwealth,* Ky., 609 S.W.2d 355 (1980). Resolution of this issue revolves around whether the officers possessed probable cause at the time of the search to believe Rainey's vehicle contained contraband or evidence of a crime.

The Commonwealth urges this Court to conclude probable cause indeed existed. In support thereof, the Commonwealth specifically asserts:

> The defendant [Rainey] had been arrested for driving under the influence. At the time the officers searched the vehicle the officers knew the defendant [Rainey] had been drinking and driving the vehicle, and that the defendant [Rainey] had just exited the vehicle. . . .
>
> When objectively viewed by the court, these facts support the belief that open containers of alcohol or other evidence of the crime might be contained within the vehicle.

Commonwealth's Brief at 4 & 6. The Commonwealth's argument essentially looks to Rainey's apparent intoxication while driving and his arrest for DUI as facts establishing probable cause; specifically, the Commonwealth contends these facts create a fair probability that open containers of alcohol or other intoxicants were in the vehicle. We must disagree.

It is well known that intoxicants may be consumed in numerous locations other than a motor vehicle, such as a bar, restaurant, private residence, sports arena, etc. It is certainly common for an intoxicated driver to have consumed intoxicants at a location other than his vehicle. In this case, the uncontroverted facts reveal that the officers did not observe Rainey consuming alcohol while operating his vehicle nor did they possess any information tending to show Rainey had done so. On the contrary, Rainey told the officers he had been thrown out of a bar, which would lead to the logical conclusion he had been drinking at the bar rather than in his vehicle. Upon the totality of the circumstances, we cannot conclude there exists a fair probability that open containers of alcohol or other intoxicants would be found in Rainey's vehicle. Hence, we hold the officers

did not possess probable cause to search Rainey's vehicle as required under the automobile exception.

In sum, we are of the opinion the search of Rainey's vehicle violated § 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution. Therefore, the circuit court properly granted Rainey's motion to suppress the handgun seized from his vehicle.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Albert B. Chandler III
Attorney General

Teresa Young
Special Assistant
Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Keith E. Kamenish
Louisville, Kentucky

NO. 02CR 0912 JEFFERSON CIRCUIT COURT
DIVISION FIVE (5)

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **ORDER**

WILLIAM RAINEY DEFENDANT

(Entered Sep. 5, 2002)

This matter was submitted to the Court after a hearing which was held on July 15, 2002, pursuant to the defendant's Motion to Suppress the evidence seized at his arrest on January 29, 2002. The defendant also moves to suppress any statements made by him on that date.

The Court, after hearing the testimony presented in this case, as well as reading the briefs submitted by the parties, **HEREBY FINDS AND ORDERS AS FOLLOWS:**

The defendant, William Rainey, was arrested on January 29, 2002. Two officers were present at the arrest. One was Officer Steven Glauber, who testified at the suppression hearing, the other was Officer Wilkins. This arrest occurred approximately 4:00 a.m. The officers testified that they observed the defendant getting out of his car and he was yelling as he was getting out of the car. They stopped the defendant approximately fifty feet away from his vehicle. Officer Glauber said that the defendant smelled of alcohol and refused to take a field sobriety test. Officer Glauber testified that they searched the vehicle incident to an arrest and found a handgun under the seat.

The defense argues that the search of the vehicle was improper because the search cannot be justified as a search incident to Mr. Rainey's lawful arrest. The Court has been cited the case of *Chimel v. California,* 395 U.S.

752 (1969), as well as other cases which support their position that the search was not lawful. The defendant argues that Mr. Rainey was so far away from his vehicle, which was a Ford Explorer, that he could not have retrieved a handgun or destroyed any evidence. Therefore, the Ford was not within his immediate control as required in the case of *Chimel* as well as other cases cited by the defendant. The defense argues that this lack of control by the defendant makes the search unlawful.

The Commonwealth does not specifically address his issue in their response but states that the police had probable cause to search the vehicle because Mr. Rainey was obviously intoxicated and, that further, they had probable cause to believe that the automobile contained contraband or evidence of a crime. There was no such testimony, however, there was some belief of any contraband or evidence of any crime.

The Court agrees with the arguments advanced by the defendant that this search was not lawful and, therefore, suppresses the evidence found at the search which was a handgun. Although the defense had filed a Motion with this Court regarding statements made by the defendant, there was no evidence presented on this issue of statements, therefore, the Court will not suppress any statements made by Mr. Rainey at the time of the arrest.

Therefore, the defendant's Motion to Suppress the evidence seized is hereby **granted**. The defendant's Motion to Suppress any statements is hereby **denied**.

/s/ Denise Clayton
DENISE CLAYTON, JUDGE
DATE: 9-4-02

cc: Christie Foster, Assistant Commonwealth's Attorney
Keith Kamenish, Counsel for Defendant
Scott Drabenstadt, Counsel for Defendant

**Supreme Court of Kentucky**

2005-SC-0185-DG

WILLIAM RAINEY APPELLANT

ON REVIEW FROM COURT OF APPEALS

V. 2002-CA-2070

JEFFERSON CIRCUIT COURT NO. 02-CR-912

COMMONWEALTH OF KENTUCKY APPELLEE

**ORDER DENYING REHEARING**

The petition for rehearing filed by appellant is DENIED.

All concur except Minton, J., who did not sit.

Entered: August 24, 2006

/s/ Joseph F. Lambert
Chief Justice